Claims against the Government

# Introduction

Historically, the federal and state governments had sovereign immunity, which was the common law concept that no one could sue the king (government). If the state injured a person, the only way for the individual to get compensation under sovereign immunity was to persuade the legislature to pass a special law authorizing such compensation.

After the Civil War, Congress passed federal laws, including the Civil Rights Acts (42 USC 1981, et seq.), which allowed individuals to sue state officials who used state authority to violate the individual's civil rights. Starting in the 1940s, the states and the federal government, responding to the huge legislative burden of private compensation bills and the potential for corruption in private compensation legislation, passed Tort Claims Acts. These acts provided a limited waiver of soverign immunity for negligence claims against the government and its employees. These laws attempt to balance the rights of injured individuals against the need to deliver cost-effective governmental services and the need to protect public officials and employees from individual liability for doing their job. Government officials and employees have to make many unpopular decisions to protect the public health and safety, and they cannot make these decisions if they are worried about liability for themselves or for their governmental employer.

# Sovereign Immunity

Sovereign immunity refers to a government’s immunity from being sued in its own courts without its consent. This doctrine dates as far back into the English common law as the thirteenth century. The premise of sovereign immunity was that “the king can do no wrong,” because his will was the law. If the king acted, it was inherently lawful. Furthermore, there was no court high enough to try a king.

The doctrine made its way into American law when the states adopted the common law from England. Prior to the tort claims acts, which waived the immunity for certain claims, the only way to bring the federal or state government into court as a defendant was to attain its consent. *See* U.S. v. Mitchell, 463 U.S. 206, 212-13 (1983) (citing Paul Bator, et al., The Federal Courts and the Federal System 98 (2d ed. 1973)).

From the ratification of the United States Constitution until the 1985s, there were no exceptions to the sovereign immunity of the federal government. The United States Constitution declared that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9. Therefore, the only way to obtain an enforceable judgment against the federal government was by private bill. This meant that a would-be plaintiff had to petition his or her particular Congressman to introduce a bill allowing a waiver of sovereign immunity for that person's grievance. Congress could then pass that special bill, and the action could proceed in court.

Congress attempted to delegate this claims processing work to the courts. However, the U.S. Supreme Court held that this delegation violated separation of powers. Hayburns Case, 2 U.S. 409 (1792). As the federal government gradually expanded its spheres of influence, more and more private bills were introduced. This situation was not acceptable to Congress because the sheer number of claims meant there was no way to adequately investigate the merits of any claim before voting approving the immunity waiver. This might allow the approval of an otherwise unwarranted claim. The process was also difficult for litigants because of logistical difficulties. As a result, the immunity- waiver process was changed in 1855, when the Court of Claims was established.

The Court of Claims

Congress conferred jurisdiction upon the Court of Federal Claims for "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Court of Claims Act of 1855, ch. 122, § 1, 10 Stat. 612. Originally, this Court of Claims was an advisory tribunal which would investigate claims made against the government and recommend appropriate action to Congress, which would then appropriate money by private bill. Because the Court of Claims was originally only empowered to issue advisory opinions, it was considered to be a legislative or Article I court. This meant the judges did not receive the constitutional protections of tenure during good behavior and assurance against salary diminution that Article III judges received.

In his State of the Union Message of 1861, President Lincoln recommended that the court be authorized to render final judgments. He declared that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). In 1863 Congress adopted Lincoln's recommendation and the decisions of the court became binding, meaning Congress was no longer required to approve the judgments. Act of March 3, 1863, ch. 92, 12 Stat. 765. Congress granted appellate jurisdiction to the Supreme Court over Court of Claims judgments in 1866. Act of March 17, 1866, *c.* 19, (14 St. 9). *See also* DeGroot v. U.S., 72 U.S. 419 (1866) (Supreme Court hears an appeal from Court of Claims).

Once the Court of Claims was granted power to render final judgments, its status as an Article I court was unsure. The Supreme Court decided in Williams v. United States, 289 U.S. 553 (1933), that the Court of Claims was an Article I court and Congress could therefore reduce the salaries of the judges on that court, which would be constitutionally forbidden for Article III courts.

The Tucker Act

The Tucker Act was passed in 1887. This law was a jurisdictional statute which expanded the scope of claims the Court of Claims could hear, but did not create any new substantive rights. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980). The Tucker Act did two things: (1) Plaintiffs could seek judgments against the federal government for claims based upon the U.S. Constitution; (2) Circuit courts received concurrent jurisdiction with the Court of Claims for money damage claims of up to $10,000. In 1911, the jurisdiction of the circuit courts was transferred by Congress to the federal district courts.

In the Federal Courts Administration Act of 1992 (P.L. 102-572 § 902), the Court of Claims was renamed the Court of Federal Claims. The court is established under Article I. 28 U.S.C. § 171(a). The bench consists of sixteen judges, appointed by the president for terms of fifteen years. Procedure is in accordance with the Rules of the United States Claims Court, which are derived from the Federal Rules of Civil Procedure. Since 1982, the Court of Appeals for the Federal Circuit has is the route for an appeal from a Court of Federal Claims ruling. 28 U.S.C. § 1295(a)(3).

It has jurisdiction to “render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491. As such, the Court of Federal Claims hears three main types of suits against the government: government contract disputes; Fifth Amendment takings claims; and claims for tax refunds. The Tucker Act waives sovereign immunity for such claims against the federal government. United States v. Mitchell, 463 U.S. 206 (1983). Generally, only money damages are available in a Tucker Act claim. United States v. King, 395 U.S. 1 (1969). The Court of Federal Claims must accept as binding precedent any decision published by the former Court of Claims. West Seattle Gen. Hospital, Inc. v. United States, 1 Cl. Ct. 745 (1983). The Court of Federal Claims lacks jurisdiction under the Tucker Act to hear tort claims against the federal government; such claims must be brought under the Federal Tort Claims Act. Indeed, until the passage of the FTCA, private bill was the continued method for bringing tort claims against the federal government.

The Little Tucker Act

The Little Tucker Act was passed in 1887 and is now codified at 28 U.S.C. § 1346(a)(2). It gives the district courts original jurisdiction, concurrent with the Court of Federal Claims, of any civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. Thus, federal district courts were granted jurisdiction, along with the Court of Federal Claims, over “Tucker Act” suits against the federal government for claims under $10,000, hence the "little" Tucker Act.[United States v. Hohri, 482 U.S. 64 (1987)] Litigants now have an easier time of pursuing Tucker Act claims because they are able to utilize the district courts instead of traveling to Washington, D.C. with witnesses and evidence. Shaw v. Gwatney 795 F.2d 1351 (8th Cir. 1986).

If the claim is brought in a district court, that court sits as if it were the Court of Federal Claims. There is no jury trial and money judgments are generally the only relief available. Furthermore, claims must be for no more than $10,000 and state law plays no part in the case. The plaintiff does have the option of waiving all damages that exceed the $10,000 cap in order to retain the district court’s jurisdiction. Smith v. Orr, 855 F.2d 1544 (C.A.Fed. 1988). The federal rules of procedure are applied. If a claim is erroneously brought in federal district court, the court has the authority to transfer the case to the Court of Federal Claims. 28 U.S.C. § 1406(c). Appeals for Tucker Act claims decided in district court are brought to the United States Court of Appeals for the Federal Circuit, regardless of the which circuit the district court is part of.

Mixed Cases

An interesting scenario not considered in the statute occurred when a mixed case—one which involves multiple issues that are not all appropriate for Court of Claims jurisdiction—presented itself to the Supreme Court. Japanese- American World War II internees and their representatives brought suit against the United States, seeking money damages and declaratory judgment on 22 claims based upon a variety of constitutional violations, torts, and breach of contract and fiduciary duties. The Court held that: (1) language of Federal Courts Improvement Act did not clearly address mixed cases presenting claims under both those statutes; (2) bifurcation of the appeal was an inappropriate means of resolving jurisdictional problem; and (3) the legislative history and Congressional desire for a uniform adjudication of Little Tucker Act claims favored an interpretation that the federal circuit court had exclusive appellate jurisdiction over mixed cases. United States v. Hohri, 482 U.S. 64 (1987).

Current Status of Federal Sovereign Immunity

The government’s immunity has subsequently been eroded by the courts, by statute, and by the Constitution itself, which guarantees certain enforceable rights to the individual. Still, there are recognized grounds for preserving immunity, at least in some circumstances. First, the Eleventh Amendment maintains certain immunities for states. Second, governmental decision makers should not be influenced by fear of private tort litigation. Last, it seems illogical for a claim to be brought against the very authority that created that claim.

The modern application of sovereign immunity prevents the federal and state governments from being sued without their consent, not because “the government can do no wrong,” but because of the need to protect the public treasury and to protect governmental decision makers from being influenced by the threat of private lawsuits. "The government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

# Governmental Liability for Torts

States and the federal government are immune from tort unless they waive soverign immunity through the statutes or through their state constitution. (Louisiana abolished state soverign immuniuty when it revised it's constition in 1974.) These laws waiving immunity provide the only mechanism for suing the federal government for tort damages, and, as discussed later, some types of damages, such as defamation, cannot be recovered against the federal government. As will be discussed, Congress preempted state immunity through the Civil Rights Act after the Civil War, allowing claims for certain torts without the requirement that the state waive its soverign immunity.

Federal Tort Claims Acts (FTCA)

Tort claims acts (TCA) are statutes that waive the government's sovereign immunity from tort liability. These statutes allow courts to exercise jurisdiction over the government in certain cases, thus allowing citizens to seek relief for torts committed by government employees. TCAs remove the need to directly petition the legislature for tort damages with a private bill, making relief from the government much more available.

The FTCA allows recovery "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." It allows people to sue federal government officials for certain actions by waiving the government’s immunity from tort liability.

Courts will strictly construe claims of government waiver of immunity in favor of the government. If a claim is ambiguous, the government will get the benefit of the doubt and retain immunity from liability.

The FTCA was enacted in 1946 to make the federal government liable in suit for the torts of its employees in the same way as a private individual is liable, although with some exceptions. Since there was no federal tort law to apply, the FTCA relies on substantive tort law of the state in which the claim arose. Molzof v. U.S., 502 U.S. 301 (1992). The ramifications of this are that if a particular tort is not recognized in that state, the plaintiff has no case. Midwest Knitting Mills, Inc. v. U.S., 950 F.2d 1295 (7th Cir. 1991).

The FTCA operates under a vicarious liability theory. If a suit is brought against a federal official for a common law tort, the federal government becomes the defendant. The federal official would be dismissed from the suit, and the federal government would be the defendant. Any damages awarded to the plaintiff would be paid by the federal government, not by the federal official. Therefore, the official will not be held accountable personally for damages awarded to the plaintiff, as long as the official was working within his scope of employment. Whether an official was working within the scope of his employment is determined on a case-by- case basis, but will include any normal and routine activities associated with the position he holds.

Process for Filing a Demand and Lawsuit

The district courts have exclusive jurisdiction over actions under the FTCA. Also, the FTCA is the exclusive remedy in any civil case resulting from a tort committed by a federal employee in the course and scope of employment. If suit is brought against the employee rather than the United States, the Attorney General will defend and the suit may be removed to a federal court if it has been commenced in a state court. However, the Attorney General must first certify that the employee was acting within the scope of his employment. Thus, any person who believes he has been injured by a government employee acting within the scope of his official duties will effectively be in litigation with the federal government once the Attorney General's certification of the employee's scope of employment issues. The employee can not be sued in his individual capacity if the government defends the suit.

Counsel must be aware of certain things when advancing a claim under the FTCA. There is no right to a jury trial in actions brought under the federal statute, even if one would have existed in a suit against the employee. 28 U.S.C. § 2402. Also, by forcing the injured party to bring the action against the federal government instead of the individual federal employee, the two-year statute of limitations governing FTCA cases applies regardless of state law. Therefore, the suit may be barred under the FTCA even if the action would have been timely under the state law. This result works an injustice when the plaintiff had no reason to believe that the federal government was involved in the dispute. However, the FTCA’s two- year statute of limitations will also apply to allow a claim which would be time- barred under state law. For example, a claim was allowed against the federal government even though the claim had expired under Maryland’s one-year statute of limitations. Maryland v. United States, 165 F.2d 869 (4th Cir. 1947).

Importantly, plaintiffs must first file an administrative claim with the appropriate agency before bringing a tort suit under the FTCA. This claim must give the governmental agency enough notice of its nature and basis so that it can begin its own investigation and evaluation, and it must demand payment for a "sum certain." The administrative claim must be filed within two years of the injury. 28 U.S.C. § 2401(b). A plaintiff’s failure to first file an administrative claim will result in the claim being dismissed from the court for lack of subject matter jurisdiction. Because subject matter jurisdiction cannot be waived, the requirement to first file with the appropriate agency cannot be waived, Richman v. U.S., 709 F.2d 122 (1st Cir. 1983); nor can jurisdiction be stipulated. Bush v. U.S., 703 F.2d 491 (11th Cir. 1983).

After the administrative claim is filed, the agency must deny it in writing before a suit against the United States can be filed in district court. If the agency does not act upon the claim within six months, the claim is considered to be denied and the plaintiff can then proceed to bring the federal claim in court. 28 U.S.C. § 2675(a). If the administrative claim is denied outright by the agency or denial is presumed because of agency inaction for six months, the litigant hassix months to file a tort claim in federal district court.28 U.S.C. § 2401(b).

Litigants must take special precaution to ensure that the claim proceeds in proper order. To exemplify: A woman was injured on August 10, 1981 from falling into a manhole being worked on by the Veterans Administration (VA). She properly filed the claim with the VA on April 22, 1982. However, she filed an FTCA claim against the United States in federal district court on August 10, 1982. The VA sent her notice of denial of her administrative claim on October 22, 1982. On May 31, 1983, the district court dismissed the suit for lack of subject matter jurisdiction because the plaintiff had filed before receiving notice of denial from the VA. She was allowed to amend her complaint, and filed the amended supplemental complaint on June 13, 1983. The amended complaint was also dismissed for lack of subject matter jurisdiction by the district court. The Fifth Circuit agreed with the dismissal, holding that the claim was now time-barred. Plaintiff had 6 months to file suit in court after the VA denied the administrative claim; April 22, 1983 was therefore the relevant statute of limitations. Plaintiff’s amended complaint was filed after this date. Furthermore, the amended complaint could not relate back to the original complaint (August 10, 1982) because the original complaint was prematurely filed and was not valid. Since an amended complaint cannot relate back to a date on which the court had no subject matter jurisdiction, her claim was lost. Reynolds v. U.S., 748 F.2d 291 (5th Cir. 1984).

Notice means the claim must be sufficiently specific to make the government aware of the action so it can prepare to defend itself. Goodman v. U.S*.*, 298 F.3d 1048 (9th Cir. 2002) illustrates this requirement. A man filed an administrative claim against a federal agency for medical malpractice after the death of his wife. The claim was denied, and one day before the six-month time limit expired, he filed suit in federal court. Plaintiff later realized that the proper claim for him to file was a lack of informed consent, not medical malpractice. However, the United States argued that this claim was time-barred because six months had run since the claim was denied by the agency, and he should therefore not be allowed to amend the complaint. The circuit court of appeal decided otherwise, ruling that the administrative claim alleging medical malpractice was broad enough to put the government on notice of the claim for failure to obtain the patient's informed consent for the treatment. The administrative claim is not required to provide more than the minimal details of the factual predicate for the claim to put the government on notice. A full preview of the lawsuit reciting every possible theory of recovery is not required.

Damages

Compensatory damages are the only remedy recoverable under the FTCA. Fitch v. U.S., 513 F.2d 1013 (6th Cir. 1975). The FTCA does not allow courts to issue injunctions against the federal government. Moon v. Takisaki, 501 F.2d 389 (9th Cir. 1974). Punitive damages are expressly forbidden, even if they are allowed under state law. 28 U.S.C. § 2674.

Sovereign immunity bars an award of attorney fees against the federal government unless expressly authorized by statute. Since the FTCA does not expressly authorize attorney fees, they are not recoverable against the federal government under the FTCA. Joe v. U.S., 772 F.2d 1535 (11th Cir. 1985). Because no separate award of attorney fees may be awarded against the federal government, counsel will take payment from the awarded compensatory damages. However, the FTCA limits the amount which may be claimed by counsel from the compensatory damages award. No attorney may receive more than 25% of any compensatory damages or settlement. 28 U.S.C. § 2678.

The FTCA itself does not place a cap on the amount of damages recoverable against the federal government. However, the government’s liability is limited in the same way that a private party would be limited under the relevant state law. Therefore, the United States is able to take advantage of any state damage caps on awards for medical malpractice. Carter v. U.S., 982 F.2d 1141 (7th Cir. 1992).

Exceptions to the FTCA

The FTCA does not waive immunity for all torts: major exceptions are carved out in [28 U.S.C. § 2680](http://biotech.law.lsu.edu/cases/immunity/ftca_exceptions.htm). These exceptions stipulate that the federal government will not be held liable for the claims against its employees arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Also not allowed are damages from a quarantine imposed by the federal government. Claims based on intentional actions that are excluded from the FTCA may be brought as *Bivens* actions, if they rise to the level of constitutional violations (constitutional torts).

Products liability claims are not specifically addressed in the FTCA. However, cases that have dealt with questions of federal government liability for defective products generally dispose of such claims on government contractor or discretionary function grounds. For example, in a toxic tort claim against the federal government under the FTCA for neurological problems suffered by an infant allegedly as a result of exposure to roof sealant, the court held, *inter alia*, the claims against the government were barred under either the independent contractor exception or discretionary function exception. Goewey v. U.S., 886 F. Supp. 1268 (S.C. 1995). Strict liability for ultrahazardous activities is not allowed against the federal government under the FTCA. Laird v. Nelms, 406 U.S. 797 (1972).

Perhaps most significantly, § 2680(a) precludes recovery from the government for:

"[A]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

This is the discretionary-function exception, and is discussed more fully below.

Discretionary Function Defense

The FTCA (and most state tort claims acts) preserve immunity from tort liability for the discretionary acts of government employees. This discretionary function exception is perhaps the most notable and complex exception to FTCA liability.

A discretionary function is an act involving an exercise of personal judgment. The basis for the discretionary function exception to the FTCA is the legislative branch's desire to prevent judicial second-guessing through tort actions of legislative and administrative decisions grounded in social, economic, and political policy. The federal government retains immunity from tort liability for itself and its employees for the performance or nonperformance of discretionary functions. This immunity is granted when the act in question requires the exercise of judgment in carrying out official duties. Discretionary immunity applies unless a plaintiff can show that a reasonable person in the official's position would have known that the action was illegal or beyond the scope of that official's legal authority. [Harlow v. Fitzgerald, 457 U.S. 800 (1982)](http://biotech.law.lsu.edu/cases/immunity/harlow.htm).

[U.S. v. Varig Airlines, 467 U.S. 797 (1984)](http://biotech.law.lsu.edu/cases/immunity/varig.htm) is a major case concerning the discretionary function. Here, the federal government was not held liable in a negligence action. A plane caught fire in midair and although it landed safely, many on board died from asphyxiation. The airline and survivors brought suit against the federal government for negligently certifying that the airplane met the applicable federal safety standards based upon a spot-check which did not include every aspect of safety. The Supreme Court held that the inspection was discretionary, and the government was therefore not liable. The Court did not want to involve itself with policy and the distribution of limited resources, which is how it viewed the safety inspection policy of only checking certain aspects of the plane for safety.

Ministerial Tasks

Immunity from tort liability does not apply if the action was mandated by law or regulation. These acts are not discretionary in nature, but ministerial. Ministerial tasks are those that do not require an official's discretion because they either follow a predetermined plan and cannot be changed, such as following a health department checklist regulation, or they do not involve any special expertise, such as driving a car. If a law or a regulation dictates a government employee’s course of action, that employee will be subject to liability for failure to comply.

[Berkovitz v. U.S., 486 U.S. 531 (1988)](http://biotech.law.lsu.edu/cases/immunity/Berkovitz_by_Berkovitz_brief.htm) is an important case on the discretionary function applied to the FTCA, and contrasts with *Varig*. There, a polio vaccine taken by plaintiff's infant son resulted in the child contracting the disease and becoming paralyzed as a result. A unanimous Supreme Court allowed the plaintiffs to recover under the FTCA when the federal government failed to follow its own regulations for approving the polio vaccine. The determination of how to test the polio vaccine was a discretionary function because it involved an element of choice or judgment on the employee's part. For this, the government could not be held liable under the FTCA. Once a regulation was made on how to test the vaccine, employee discretion was taken away and the function became ministerial. Therefore, immunity did not apply because the government has a duty to follow its own regulations.

Because the discretionary exception is meant to shield the government from liability for actions that require judgment according to public policy, the government was not liable in *Varig* but liable in *Berkovitz*. The regulatory scheme in *Varig* gave the agency broad powers to inspect aircraft in a manner it deemed best with the resources the agency possessed. The employee in *Berkovitz*, however, had no discretion to approve a bad batch of polio vaccine.

To further illustrate: A wrongful death suit (tort) was brought against the federal government arising out of the actions of emergency personnel in a national park accident. The plaintiff alleged that emergency personnel did not properly stabilize the victim, did not properly administer CPR, and did not have the necessary equipment at the rescue site. Properly stabilizing the victim and administering CPR was not a discretionary function, and those claims were allowed under the FTCA. The court said the federal government is not immune from claims which challenge the actual administration of medical care by its employees, when the claims do not concern actions which are the product of judgment driven by consideration of competing policy- based choices. The failure of the emergency workers to have certain equipment on hand was a decision of which park stations should possess certain equipment. Not every park station could have the equipment because it was too expensive. Therefore, it was a discretionary function and the claim was not allowed. The National Park Service's decision as to the stationing of emergency medical technicians at various locations in the park is a protected discretionary function, but the technicians' rendering of medical services is not. Fang v. U.S*.*, 140 F.3d 1238 (9th Cir. 1998).

Contrast this holding of immunity with another case involving a lab worker’s exposure to rabies, which caused severe and permanent brain damage. The accident occurred in a state run lab, under the supervision of both a state doctor and a federal (CDC) doctor. The claim against the federal government for failure to warn of the dangers of the experiment fell under the FTCA, and was not a discretionary function. Therefore, the federal government was not immune. [Andrulonis v. U.S*.*, 952 F.2d 652 (2nd Cir. 1991)](http://biotech.law.lsu.edu/cases/immunity/andrulonis01.htm)

Intentional Torts under FTCA

The intentional torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h). Of these, the assault and battery exemption is of particular importance because the government can often successfully assert this exemption in medical claims where the alleged malpractice can be defined as a battery or assault.

Assault and Battery

This exception to the FTCA was applied in a case where the plaintiff alleged deviant sexual conduct by an Air Force clinical social worker who was treating the plaintiff for "blackouts". The court dismissed the claim by determining that the sexual misconduct constituted assault and sovereign immunity was therefore not waived. Doe v. U.S., 769 F.2d 174 (4th Cir. 1985).

In a Fifth Circuit case, a Naval recruit who alleged that she had contracted a venereal disease from consensual intercourse with an enlisted Naval petty officer sued under the FTCA, alleging fraudulent concealment of the infection by the officer and negligence on the part of the Navy. The court held that the fraudulent concealment of infection claim made the officer’s actions a battery, and therefore fell within the intentional tort exception to the FTCA's waiver of sovereign immunity. Additionally, the claims of the Navy’s negligence were not sufficiently distinct from the battery claim against the officer, and therefore were also not admissible under the FTCA.[[Leleux v. United States, 178 F.3d 750 (5th Cir. 1999)](http://biotech.law.lsu.edu/cases/STDs/Leleux.htm)]

In contrast, the assault and battery exception did not apply when there was no intentional wrongful act on the part of a government surgeon in cutting into the plaintiff's right knee when the left knee was supposed to be the one operated on. The court in Lane v. United States, 225 F. Supp. 850 (D.C. Va. 1964) concluded that § 2680(h) was inapplicable because under general tort law, assault must contain an element of intent. Furthermore, the surgeon was negligent, and this negligence should not lose its identity simply because the ultimate injury was the combined result of the negligence and the assault. The plaintiff was allowed to recover damages from the government.

Importantly, the assault or battery must have been committed by the government employee, not by a third party. For example, where an Air Force psychiatrist negligently failed to transmit to a second psychiatrist the history of a mentally ill airman who, as a result, was released and killed his wife, the court said the assault and battery exception was not applicable. The court noted that the assault and battery exception applied only to assault by government agents, not to assault by third parties which the government negligently failed to prevent. Underwood v. U.S., 356 F.2d 92 (5th Cir. 1966).

Defamation

There is an express exception in the FTCA for libel and slander. Congress thus intended to retain sovereign immunity with respect to defamation allegations against federal employees. Government officials, including public health officials, often use publicity, which might include defamation, to change or influence policy. For example, if a health inspector informs the press about a restaurant’s violations, the bad publicity generated might have more impact than any other enforcement measure. The health inspector will generally not be held liable to the restaurant for damages, even if the statements are false.

Military

In a military context, the federal government still retains immunity from liability from suits by servicemen. In the seminal case [Feres v. U.S., 340 U.S. 135 (1950)](http://biotech.law.lsu.edu/cases/immunity/feres_v_us.htm), the Supreme Court held that the United States was not liable in tort for the death of a serviceman by fire in the barracks while on active duty, or for the injury or death of servicemen resulting from negligence in medical treatment by Army surgeons. This case established that the FTCA does not waive immunity for injuries to servicemen arising out of, or in the course of, activity incident to military service. Significantly, the *Feres* bar on recovery does not hinge on the military status of the tortfeasor. Rather, the *Feres* doctrine bars all suits on behalf of service members against the federal government based upon service- related injuries. U.S. v. Johnson, 481 U.S. 681 (1987).

The government can be liable under the FTCA when the injury does not arise out of conduct incident to military service. This “incident to service requirement” is examined on a factual, case-by-case basis and will not be reduced to a bright-line test. U.S. v. Shearer, 473 U.S. 52 (1985). Still, it is applied broadly by the courts to bar government tort liability. For example, the *Feres* doctrine barred an active duty serviceman's claim for an injury incurred despite that the serviceman was off duty playing basketball, some of those who treated his injury were civilians, and his alternative legal remedies may have been inadequate. Borden v. Veterans Admin., 41 F.3d 763 (1st Cir. 1994).

Importantly, the *Feres* doctrine only applies to active military personnel. Therefore, claims brought by civilians or civilian dependents of service members are not barred by *Feres*. Mossow By Mossow v. U.S., 987 F.2d 1365 (8th Cir. 1993).

Retired military personnel are also not barred from bringing an FTCA claim by *Feres.* McGowan v. Scoggins, 881 F.2d 615 (9th Cir. 1989). This case presented an FTCA claim brought by a retired Army officer, seeking damages for harm suffered while entering an Air Force Base. The court held that the *Feres* doctrine is inapplicable to a claim filed by someone who is not a member of the armed forces for an injury that was not incident to current military service, or who is not subject to supervision of military personnel.

Members of state National Guard units not in the active federal service are considered employees of the individual state, not of the Federal Government. Therefore, the United States is not held liable under the FTCA for the negligence of nonactivated members of the guard.Williams v. United States, 189 F.2d 607 (10th Cir. 1951).

Law Enforcement Exception

After the United States Supreme Court created a right to sue for constitutional violations - such as intentional torts - in the [*Bivens*](#xpointer(/descendant-or-self::ap:Topic[@OId='4zuglNbJ9Eec11ZiFp3r+Q=='])) case, Congress amended the FTCA to allow claims for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution against an "investigative or law enforcement officer" of the United States. An "investigative or law enforcement officer" was defined as "...any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The Government Contractor Defense

State tort claims are pre-empted where the plaintiff’s injury is caused by the allegedly defective design of military equipment manufactured by the defendant pursuant to a contract with the federal government. Boyle v United Technologies Corp., 487 U.S. 500 (1988). This case established the government contractor defense to tort liability. The Court reasoned that although state tort law may allow products liability claims against military manufacturers, this is an area of uniquely federal concern, regardless of the lack of federal legislation specifically claiming the immunity the absence. In an effort to determine the scope of this defense, the Court stated that this pre- emption is limited to areas of "significant conflict" between federal policy and state law. For guidance on the extent of "significant conflict", the court applied the discretionary function exception of the FTCA, which is to say that state law will be pre-empted wherever it threatens a discretionary function of the federal government. Here, the design of the allegedly defective product was a military discretionary decision.

In sum, *Boyle* established that state law which imposes liability on a military manufacturer is pre-empted when (1) the US approved reasonable precise product specifications, (2) the equipment conformed to those specifications, and (3) the supplier warned the US of the known dangers of using the equipment.

An important issue is whether the defense applies only to contracts with the military, or whether it can be used by other government contractors. The Supreme Court has employed language hinting that it may apply to all contractors, but has never spoke directly on the issue. *See* Hercules, Inc. v. U.S., 516 U.S. 417, 421 (1996) ("The Government contractor defense . . . shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government"). The lower federal courts are split on the issue.

# State Tort Claims Acts

Eleventh Amendment state immunity can be waived by the state's tort claims act (TCA). Like the Federal Tort Claims Act (FTCA), state tort claims acts were enacted by the vast majority of states to address the inequities inherent in sovereign immunity, and hold the state vicariously liable for the torts of its employees. These statutes are strictly construed—a court will resolve any ambiguities in favor of preserving state immunity. If a state employee is sued under a TCA, the state becomes the defendant in the case and is vicariously liable for damages.

Although tort claims acts differ amongst the states, certain exceptions to the waiver of immunity are made in similar fashion to the FTCA. For example, the state will not be liable for an employee's intentional torts, such as battery or sexual assault, or criminal acts. Punitive damages are not usually allowed, and caps are placed on the amount of damages a litigant can recover from the state—usually between $100,000 and $1 million.

Also, immunity from suit is preserved for certain governmental officials. For instance, Michigan provides: "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." Mich. Comp. Laws § 691.1407(5) (1965).
Perhaps most importantly, an employee's governmental, discretionary actions will not subject the state to liability.

Discretionary Acts

Like the FTCA, most state tort claims acts (TCAs) provide immunity from liability for the discretionary acts of government employees. The exception works the same way for TCAs as it does in the FTCA.

Plaintiffs may bring ordinary negligence claims if they are injured through a ministerial function. For example, adhering to regulations in the operation of a waste site is a ministerial duty, and the failure of a state government employee to do so resulted in liability for damages in Minnesota. Sletten v. Ramsey County, 675 N.W. 2d 291 (Minn. 2004). A public health official is conducting a ministerial duty when inspecting a premises according to a checklist regulation. Other examples: a city’s failure to maintain, clean, and inspect sewers; failing to equip an ambulance with certain equipment mandated by law; the maintenance of a high school stadium grounds.

Governmental v. Proprietary Functions

In addition to the discretionary-ministerial determination, most states distinguish between governmental and proprietary functions. The state may waive sovereign immunity for governmental functions, but do not apply the same limits on recovery and defenses to proprietary functions. This is the major difference between state tort claims acts and the FTCA. These definitions vary greatly amongst the states, with some states holding that almost all state activities as governmental functions and others finding that a substantial group is proprietary.

A governmental function includes services that only the government does, such as restaurant inspection, animal control, health and safety permits and licenses, sanitation, vital statistics, and related functions. A proprietary function is one that a private entity can perform, and is not uniquely for the benefit of the general public. The discretionary function defense applies to discretionary governmental functions, but not for proprietary (or ministerial) functions. There are many grey areas where states reach difference results, such as whether the design of highways is governmental or proprietary.

Perhaps the most important difference in the two classes is that the government has broad latitude to use cost benefit analysis for discretionary actions, but not for proprietary functions. For example, if highway design is governmental, the state might choose to not provide guard rails because their cost outweighs the savings in accident prevention. If this is a proprietary function, the standard will be set by the reasonable highway design, which might include guardrails despite their costs.

Many states do not consider personal medical services, such as prenatal care clinics and general indigent medical care clinics, to be governmental functions and apply ordinary medical malpractice law to them, although some states do include these under governmental immunity. However, if the medical service is related to protecting the public, rather than just helping the individual, it will be governmental. Thus, treatment and testing for tuberculosis would be a governmental function.

Personal Liability of Government Employees

As for the personal liability of public officials for injuries inflicted within the scope and performance of their official duties, health officers are not personally held liable for damages, although it is in the employee’s best professional interest not to be the cause of such litigation. TCAs work under a vicarious liability theory. Therefore, state employees must act within the limits of their authority for the TCA to apply. If the TCA applies, the state will be replaced as the defendant and pay any damages. Intentional wrongdoing that is outside the official’s duties, such as criminal conduct or intentional torts such as false imprisonment, will not be covered by the TCA. If the TCA does not apply, the state worker will be personally liable for damages.

State Tort Claim Examples

The exceptions to state tort liability have resulted in a vast body of unpredictable case law amongst the states, so no general rule applies everywhere. Situations where immunity against tort liability was extended to health officials:

Department of Health officials in Vermont received immunity for negligently issuing a lodging license, based on a vendor’s promise to bring a septic system into compliance with public health regulations. The decision to issue the license was deemed discretionary in nature. Johnson v. State, 682 A.2d 961 (1996).

A court ruled that Georgia’s sovereign immunity extended to its counties, and that this immunity barred an action to recover damages from the county health department for an allegedly negligent reading of a chest X-ray. The X-ray was taken when the plaintiff utilized the health department's free tuberculosis screening clinic. The screening failed to detect a tumor in the lung that should have been discovered, but the plaintiff’s action was dismissed. James v. Richard County Health Dept., 309 S.E.2d 411 (1983).

A licensed, board-certified physician, engaged as a fellow in medical research and training program conducted by a state hospital, was held immune from liability for the medical malpractice he allegedly committed against a patient participating in the program. Gargiulo v. Ohar, 387 S.E.2d 787 (Va. 1990). An Alabama court, on similar facts, found that teaching physicians at an Alabama state medical school were not covered by discretionary immunity.[[Ex parte Cranman, 792 So.2d 392 (Ala. 2000)](http://biotech.law.lsu.edu/cases/immunity/Ex_parte_Cranman.htm)]

A state-employed public health physician in Virginia was entitled to immunity from liability for his alleged negligence in failing to order a mammogram and needle biopsy, after detecting a lump in a patient's breast. The physician was assigned by the state to provide medical services to the public health clinic that provided care to citizens who could not afford to pay for private medical care. Lohr v. Larsen, 246 Va. 81 (Va. 1993).

Contrast these cases to the recent Louisiana case, Gregor v. Argenot Great C. Ins. Co., 851 So. 2d 959 (La. 2003). The Department of Health and Hospitals was held 50% liable for the wrongful death of a restaurant patron who died from eating raw oysters. The restaurant was obligated by law to post signs warning of the risks associated with consuming raw oysters. The restaurant had a sign posted at the bar where most oyster sales occurred, but had no sign in the dining room where the decedent consumed the oysters. The Department was not extended immunity and was held partially liable for not properly enforcing the law in its inspection of the restaurant. According to the court, the law left no room for policymaking or discretion.

The consistent rule in this area of law is that if regulations exist, a state employee has a duty to comply, or risk subjecting the state to liability under the state’s TCA for any resulting damages from the failure to comply. If the state applies a governmental-proprietary distinction, most public health activities will be covered by immunity because they are governmental in nature.

# Liability for Constitutional Torts by Federal Officials- Bivens Actions

The Supreme Court created a private damages action against federal officials for constitutional torts (civil rights violations), which are not covered by the FTCA. In [Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)](http://biotech.law.lsu.edu/cases/immunity/bivens.htm), the Court held that the Fourth Amendment gives rise to a right of action against federal law enforcement officials for damages from an unlawful search and seizure. Since a *Bivens* action is brought against a federal official in the official’s personal capacity, it is not considered to be an action against the United States and therefore is not barred by sovereign immunity. *Bivens* is not a general tort law. The plaintiff seeking a damages remedy under *Bivens* must first demonstrate that constitutional rights have been violated.[[Davis v. Passman, 442 U.S. 228 (1979)](http://biotech.law.lsu.edu/cases/immunity/passman.htm)]

*Bivens* suits have been acknowledged by the Court as having more of a deterrence effect against federal officials from committing constitutional torts than the FTCA. This is chiefly because a *Bivens* suit is a personal suit against the official, and punitive damages are recoverable. The government is substituted for the defendant in FTCA cases, and the FTCA does not allow punitive damages. Thus a *Bivens* defendant is at risk of personal liability, including punitive damages, while the government pays all damages in FTCA cases. Procedurally, a plaintiff is entitled to a jury trial in a *Bivens* action, but not in a FTCA case.[[Carlson v. Green, 446 U.S. 14 (1980)](http://biotech.law.lsu.edu/cases/immunity/carlson.htm)]

The main defense for a federal official in a *Bivens* action is official immunity from actions for damages. There are two types of official immunity available as affirmative defenses: absolute and qualified.[[Butz v. Economou, 438 U.S. 478 (1978)](http://biotech.law.lsu.edu/cases/immunity/butz.htm)] Absolute immunity is granted to judges, prosecutors, legislators, and the President, so long as they are acting within the scope of their duties. Qualified immunity applies to federal officials and agents who perform discretionary functions, but may be overcome by a showing that their conduct violated a constitutional right.[[Harlow v. Fitzgerald, 457 U.S. 800 (1982)](http://biotech.law.lsu.edu/cases/immunity/harlow.htm)] Absolute and qualified immunity are discussed more fully below.

Immunity Defenses

Allowing liability claims against state and federal employees may be necessary to protect against arbitrary actions against individuals, but they can paralyze government action if they make governmental employees fearful of acting. To limit this threat, state and federal law recognizes two immunity based defenses to *Bivens* and §1983 claims.

Absolute Immunity

Absolute immunity is not available to most officials. Unlike qualified immunity, the nature of the act is not as important as the position of the official. Generally, only judges, prosecutors, legislators, and the highest executive officials of all governments are absolutely immune from liability when acting within their authority. Medical peer review participants may also receive absolute immunity. Ostrzenski v. Seigel, 177 F.3d 245 (4th Cir. 1999).

Absolute immunity only applies to acts committed within the scope of the official's duties. Usually, this will not include acts that are committed by the official with malice or corrupt motives.

Absolute immunity is freedom from suit, and can be invoked on a pretrial motion. Judges and judicial officers, for example, enjoy a broad absolute immunity which is not abrogated even by a state's tort claims act. Fisher v. Pickens, 225 Cal. App. 3d 708 (Cal. App. 4th Dist. 1990). The immunity bars all civil suits for money damages against judicial officers such as judges and prosecutors.

Michigan's statute preserving absolute immunity for certain officials provides: "A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." Mich. Comp. Laws § 691.1407(5) (1965). Thus, these officials may not be sued in tort so long as the act occurred within the scope of that official's duty.

Qualified Immunity

The doctrine of qualified immunity is a judicially created affirmative defense which protects public officials from being tried for violations of constitutional rights. This defense to liability for constitutional claims operates in a similar manner as the discretionary function exception to tort liability. Qualified immunity applies to federal, state, and local officials equally. Butz v. Economou, 438 U.S. 478 (1978).This immunity is designed to be immunity from suit, not merely from a finding of liability. Mitchell v. Forsyth, 472 U.S. 511 (1985). The distinction is important because qualified immunity can be invoked and the lawsuit dismissed on summary judgment without the suit going through pretrial procedure and discovery. A pretrial motion is the vehicle for invoking qualified immunity. If the lower court denies qualified immunity, a defendant may appeal that ruling before litigation on the merits proceeds. This allowance for interlocutory appeal may significantly delay the litigation.

The Policy Rationale for Qualified Immunity

The rationale for granting qualified immunity to public officials is the recognition that constitutional law is constantly evolving, and public officials cannot be "expected to predict the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555 (1978). The policy reasons for protecting officials from liability from suit for all conceivable constitutional claims include the need for officials to make decisions without fear of lawsuits, the reluctance to distract officials from their public duties, and the potential that without immunity, people would be deterred from participating in public service. See Scheuer v. Rhodes, 416 U.S. 232 (1974) (explaining that qualified immunity aims to alleviate "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good").

The Clearly Established Rights Test

The Supreme Court set the modern standards for qualified immunity in [Harlow v. Fitzgerald, 457 U.S. 800 (1982)](http://biotech.law.lsu.edu/cases/immunity/harlow.htm). The Court ruled that government officials performing discretionary functions should be protected from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would be aware. Id. at 819. Those who are plainly incompetent or who knowingly violate the law cannot invoke qualified immunity. Malley v. Briggs, 475 U.S. 335 (1986). Therefore, the official will be protected from Bivens or § 1983 liability for a discretionary act unless the violated constitutional right is of such a basic nature that a reasonable person would have known it, or if the official breaks a law. This analysis requires a case-by-case analysis that is often unpredictable and difficult to determine. Additionally, qualified immunity might be defeated by showing that the official acted with malice or corrupt motives.

To defeat a defendant’s claim of immunity, plaintiffs must show a violation of a constitutional right that the defendant knew or should have known, or a violation of law. To illustrate, a Michigan appeals court ruled that qualified immunity did not shield the superintendent of a state psychiatric hospital from liability under § 1983 for the violation of a deceased patient's constitutional rights where facts indicated in the plaintiff’s pleadings alleged that the superintendent's conduct in failing to attend the medical needs of the patient violated a clearly established constitutional right of which reasonable person should have known. Gordon v. Sadasivan, 373 N.W. 2d 258 (Mich. App. 1985).

The Role of Precedent in Establishing Immunity

In contrast, the Fourth Circuit granted qualified immunity to a defendant based on a lack of sufficiently analogous precedent in Rish v. Johnson 131 F.3d 1092 (4th Cir. 1997). Federal prison inmates claimed that the prison's failure to provide them with protective equipment to safeguard them against infectious diseases while they cleaned blood, feces, and urine from prison housing and medical areas violated their clearly established Eighth Amendment rights. The plaintiffs alleged that other prisoners were infected with HIV and Hepatitis B, and that their work involved risk of contact between those inmates' bodily fluids and the plaintiffs' unprotected skin. The plaintiffs also cleaned areas which housed patients in mental seclusion who sometimes threw hazardous bodily fluids. The court held that the alleged conduct failed to defeat qualified immunity because there existed no case law clearly establishing a constitutional right in this type of situation. This is a rather surprising outcome because the Supreme Court at the time of the alleged violations had already established that a prisoner's Eighth Amendment rights are violated when a prison official acts with deliberate indifference to known, substantial risks of serious bodily harm. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (ruling that a deliberate indifference to the serious medical needs of prisoners is cruel and unusual punishment).

When determining whether a defendant violated a clearly established law or right, case law must also be analyzed. Hope v. Pelzer, 536 U.S. 730 (2002). In that case, a prisoner was handcuffed to a hitching post for seven hours, shirtless, in the Alabama sun, and not given water or bathroom breaks. He brought a § 1983 action against the guards for a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, and they claimed qualified immunity. The federal district court and the Eleventh Circuit Court of Appeals granted the guards immunity, holding the guards could not have reasonable known that what they were doing was a violation of the prisoner's rights. The Supreme Court reversed, denying immunity protection. The Court examined the Eleventh Circuit's own case law where it established a standard for determining what constitutes an Eighth Amendment violation. Thus, the appropriate way to analyze a unique fact pattern is to apply case law. Here, case law implied that using a hitching post in such a way was a constitutional violation and although the issue had never arisen, the guards could not successfully claim they did not know their actions violated the prisoner's constitutional rights.

Examples of case decisions that have found qualified immunity: The Supreme Court acknowledged qualified immunity for state hospital administrators in O'Connor v. Donaldson, 422 U.S. 563 (1975). In another case, a Kansas federal court granted summary judgment on qualified immunity grounds to two staff members of a state mental health hospital. The court found the staff members were entitled to qualified immunity in a § 1983 action filed on behalf of a patient who was involuntarily committed and died as a result of suffocation from being restrained. The officials were exercising a discretionary duty and were doing what they believed to be reasonable at the time. As a result, damages were denied. Unzueta v. Steele, 291 F. Supp. 2d 1230 (D. Kan. 2003).

Bivens and Alternative Remedies

*Bivens* actions have been restricted by the Supreme Court when Congress has created other avenues for review and compensation. For example, the Court denied a *Bivens* action for procedural due process violations under the Social Security Act disability provisions because Congress had created an independent remedial scheme to restore benefits. [[Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)](http://biotech.law.lsu.edu/cases/immunity/Chilicky.htm)] Courts are careful not to extend *Bivens* where it is unnecessary or inappropriate. Some factors that may counsel hesitation in allowing *Bivens* action against federal actors include: conflict with federal fiscal policy; the existence of a comprehensive remedial scheme providing meaningful remedies created by Congress; and the unique structure and nature of the military. *Id*. at 421.

Public Health and Safety Bivens Claims

The courts are usually reticent to allow *Bivens* claims in public health and safety cases. In [Nebraska Beef v. Greening, 398 F.3d 1080 (8th Cir. 2005)](http://biotech.law.lsu.edu/cases/immunity/Nebraska-Beef.htm), plaintiff brought a *Bivens* suit against U.S. Dept. of Agriculture food safety inspectors for damages to its reputation and business. The appellate court dismissed the suit, noting that the Supreme Court has been reluctant to extend *Bivens* suits to new areas. The court explained that there is a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees," and "if Congress has not explicitly created such a right of action, and if it has created other remedies to vindicate (though less completely) the particular rights being asserted in a given case, the chances are that the courts will leave the parties to the remedies Congress has expressly created for them." *Id.* at 1084. In *Nebraska Beef*, the court found that Congress had already created a comprehensive regulatory regime, and the existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a *Bivens* action.

United States Public Health Service employees were found liable under *Bivens* for the conscious disregard of the medical needs of an INS detainee, who died of cancer after being repeatedly denied medical care.[[Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008)](http://biotech.law.lsu.edu/cases/immunity/Castaneda.htm)] The court rejected claims by the defendants that the case should have been brought as a negligence action under the [Federal Tort Claims Act](http://biotech.law.lsu.edu/cases/immunity/ftca.htm), finding that their intentional actions went beyond negligent care and that congress did not intend to make the FTCA the sole remedy against PHS employees.

Bivens Actions against Private Actors

*Bivens* actions may be brought against private entities operating under color of federal law in the same what that [§1983](#xpointer(/descendant-or-self::ap:Topic[@OId='QGF9zRHaL0y2ZpslCXk8mQ=='])) claims may be brought against persons acting under color of state law. One court summarized the tests for acting under color of federal law:

As already noted, Bivens applies to constitutional violations committed by private parties only if they act "under color of federal law"; or, put another way, only if the parties are "federal actors". The tests employed for determining whether a private party acts under color of federal law are similar to the tests employed for determining whether a private party acts under color of state law. Nwanze v. Phillip Morris, Inc., 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000) (courts treat Bivens actions and § 1983 actions as analogous for most purposes), aff'd, 2001 U.S. App. Lexis 7502, 2001 WL 409450 (2d. Cir. Apr. 23, 2001).

These tests include the "direct links" test, Lebron v. Nat'l Railroad Passenger Corp., 513 U.S. 374, 397-400, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995) (a direct link between private corporation and federal government establishes that corporation acted under color of federal law); the public function test, Rendell- Baker v. Kohn, 457 U.S. 830, 842, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982) (a private party performing a function traditionally the exclusive prerogative of the government is a government actor); the nexus test, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974) (a private party is a state actor when there is a sufficiently close nexus between the government and the challenged action of the private party that the action of the private party is fairly treated as that of the government itself); and the symbiotic relationship test, Burton, 365 U.S. at 862 (a private party is a state actor when the government has so far insinuated itself into a position of interdependence with that party that the government must be recognized as a joint participant in the challenged activity) [[*Sarro v. Cornell Corrections, Inc.*, 248 F.Supp.2d 52,59 (D.R.I. 2003)](http://biotech.law.lsu.edu/cases/prisons/sarro.htm)]

[Correctional Serv. Corp. v. Malesko, 534 U.S. 61 (2001)](http://biotech.law.lsu.edu/cases/immunity/cms_v_malesko.htm) held that a *Bivens* suit can not sustain an action for damages against private entities acting under color of federal law. The case involved an alleged violation of a prisoner’s constitutional rights in a federal prison operated by a private corporation. The court rejected the claim against the corporation because the history of Bivens actions is one of claims against individuals to deter individual bad behavior. However, the Court recognized that other remedies were available against the corporation, such as a suit for injunctive relief in district court or a private state tort remedy unavailable to prisoners in a government- run prison.

In [*Sarro*](http://biotech.law.lsu.edu/cases/prisons/sarro.htm), the court also dismissed *Bivens* charges brought by a federal prisoner against the private corporation which ran the prison. Yet the guards were held liable because the prisoner had no alternative remedy against them, although the guards were not federal officers. The guards were acting under color of federal law since they were performing functions normally done by federal officers. This was consistent with the policy of Bivens to discourage individual bad behavior. Other courts have rejected Bivens liability for private prison guards and the circuits remain split as of 2009.[[Bender v. General Services Administration, 539 F.Supp.2d 702 (S.D.N.Y. 2008)](http://biotech.law.lsu.edu/cases/prisons/bender.htm)]

# Liability for Constitutional Torts by State Officials: 42 U.S.C. § 1983 (1871)

§ 1983 actions are brought against state officials to remedy the violation of one's constitutional rights (constitutional torts). Since these violations are not subject to tort claims acts, vicarious liability does not apply and officials can be held personally liable. Therefore, the public official being sued must personally have played a role in the disputed activity. The plaintiff must show that the official (1) acted under color of state law and (2) violated a clearly established constitutional right. Officials who retain absolute immunity are free from suit. Fortunately for the public employee who receives only qualified immunity, courts will uphold his or her immunity from suit if the employee acted in good faith. This leaves much leeway for the public official who is untrained in the finer aspects of constitutional law, and still allows liability for egregious violations of one's civil rights. To defeat qualified immunity, a claimant must show that the violated constitutional right was clearly established and the official knew (or should have known) that his action would violate this right.

State Immunity: The Eleventh Amendment

The Eleventh Amendment limits private actions brought against states in federal court. Its full text provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.

The Eleventh Amendment was ratified in 1798 in order to overrule the Supreme Court’s decision that a South Carolina citizen could sue the state of Georgia for money damages. [Chisholm v. Ga., 2 U.S. 419 (1793)] This decision caused uproar amongst the states because it impinged on the sovereignty of the state, which was supposed to have been retained in the Constitution. Shortly thereafter, the amendment was passed.

The Eleventh Amendment prevents federal courts from exercising jurisdiction over state defendants--the federal court will not even hear the case if a state is the defendant. A state may not be sued in federal court by its own citizen or a citizen of another state, unless the state consents to jurisdiction. [Hans v. La., 134 U.S. 1 (1890)] Consent to the jurisdiction of the federal court may be manifested by the state voluntarily appearing in the court to defend itself on the merits of the case. [Gunter v. A. Coast Line R.R., 200 U.S. 273, 284 (1906)] Eleventh Amendment immunity extends to suits filed against the state in state courts and before federal administrative agencies. [Alden v. Maine, 527 U.S. 706 (1999); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002)] Unless the state or the federal government creates an exception to the state's sovereign immunity, the state is immune from being sued without consent by any citizen in federal courts, state courts, or before federal administrative agencies.

Exceptions to Eleventh Amendment Immunity

There are three main exceptions to the sovereign immunity of a state. First, The Eleventh Amendment does not stop a federal court from issuing an injunction against a state official who is violating federal law. Although the state official may be abiding by state law, he is not permitted to violate federal law, and a federal court can order him to stop the action with an injunction.[[Ex Parte Young, 209 U.S. 123 (1908)](http://biotech.law.lsu.edu/cases/immunity/young.htm)] Money damages are possible against the state officer, as long as the damages are attributable to the officer himself, and are not paid from the state treasury. Scheuer v. Rhodes, 416 U.S. 232 (1974).

The Eleventh Amendment does not automatically protect political subdivisions of the state from liability. Moor v. County of Alameda, 411 U.S. 693 (1973). The main factor is whether the damages would come out of the state treasury. Hess v. Port Authority Trans-Hudson Corp., 115 S. Ct. 394 (1994), If the state would have to pay for damages from the state treasury, then the Eleventh Amendment will serve as a shield from liability. Other factors may include the amount of state control and how state law defines the subdivision, although the Supreme Court has never issued a comprehensive guideline. Eleventh Amendment immunity does not protect municipal corporations or other governmental entities that are not political subdivisions of the state, such as cities, counties, or school boards.

Finally, the states surrendered a portion of the sovereign immunity that had been preserved for them by the Constitution when the Fourteenth Amendment was adopted. Therefore, Congress may authorize private suits against non- consenting states to enforce the constitutional guarantees of the Fourteenth Amendment. The Eleventh Amendment is a constitutional limit on federal subject matter jurisdiction, and Congress can override it by statute only pursuant to the § 5 enforcement power of the Fourteenth Amendment.

Abrogating State Immunity

The Supreme Court has held that although the state enjoys immunity from the power of federal court, state officials are not immune from suit if the circumstances indicate that Congress intends to abrogate the state’s immunity. Congress may abrogate a state’s immunity to suit when enforcing the constitutional rights guaranteed by the Fourteenth Amendment. As the Supreme Court stated, “The Eleventh Amendment and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of the Fourteenth Amendment.” The Court added, “Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts.” Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Federal courts can exercise jurisdiction when the state attempts to deny a civil right to a citizen, in violation of the Fourteenth Amendment. For this to happen, Congress must specifically intend for the statute to abrogate the state’s immunity. Quern v. Jordan, 440 U.S. 332 (1979).

This power of Congress to abrogate a state’s immunity is appropriately exercised only in response to a pattern of irrational state transgressions. For example, when a state employee sued the trustees of the University of Alabama to force compliance of the Americans with Disabilities Act (ADA) the suit was dismissed on Eleventh Amendment grounds for a number of reasons, two which were:

(1) States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational, and

(2) The legislative record of the ADA failed to show that Congress identified a pattern of irrational state discrimination in employment against the disabled, and thus did not support abrogation of the states' Eleventh Amendment immunity from suits for money damages under Title I of the ADA.[[Bd. of Trustees of U. of Ala. v. Garrett, 531 U.S. 356 (2001)](http://biotech.law.lsu.edu/cases/ada/garrett.htm)]

By requiring a pattern of pervasive state constitutional violations, the Supreme Court limits Congress’ ability to override the states’ sovereign immunity except when deemed necessary. Garrett concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. It left open however, the question whether the Eleventh Amendment permits suits for money damages under Title II.

The recent case [Tenn. v. Lane, 541 U.S. 509 (2004)](http://biotech.law.lsu.edu/cases/ADA/lane.htm), addressed that issue, and did find the necessary pattern of irrational state discrimination. In August 1998, George Lane and Beverly Jones filed an action against the State of Tennessee and a number of Tennessee counties, alleging violations of Title II of the ADA. Both are paraplegics who use wheelchairs for mobility. They claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator.

At his first appearance in court, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and as a result had lost both work and an opportunity to participate in the judicial process. The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The Court held Title II of the ADA, prohibiting discrimination by a public entity, validly abrogated Eleventh Amendment immunity through enforcement of the Fourteenth Amendment, as applied to cases implicating the fundamental right of access to the courts.

Personal Liability for Constitutional Torts

Governmental officials and employees should understand § 1983 actions because they may be held personally liable for constitutional torts. A constitutional tort is an action that violates the Constitution but is not otherwise tortious. § 1983 does not create any substantive rights, but provides a remedy for plaintiffs who have been deprived of rights, privileges, or immunities granted by the Constitution or federal law. Daniels v. Williams, 474 U.S. 327 (1986). A common example of a constitutional tort is a violation of one’s due process rights. § 1983 was enacted in the wake of the Civil War to enable the federal government to enforce Fourteenth Amendment constitutional rights in the South. The Supreme Court recognized the need for federal courts to be involved in the enforcement of the Fourteenth Amendment. Therefore, the Court applied a “legal fiction” in order to circumvent the Eleventh Amendment protection and hold a state official accountable for violation of a federal law. The Court reasoned that a state government official will be deemed to be “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”[[Ex Parte Young, 209 U.S. 123, 160 (1908)](http://biotech.law.lsu.edu/cases/immunity/young.htm)] Although the official’s action is a state action for purposes of the Fourteenth Amendment, the action is not an action of the state under Eleventh Amendment. Thus, the state’s Eleventh Amendment immunity is maintained while at the same time allowing a suit against the state official to enforce the Fourteenth Amendment guarantees.

§ 1983 will be applied liberally to achieve its goal of protecting official violations of federally protected rights. Dennis v. Higgins, 498 U.S. 439 (1991). The plaintiff must assert that the defendant (1) acted under color of state law and (2) deprived the plaintiff of a right secured by the Constitution or a federal statute. Gomez v. Toledo, 446 U.S. 635 (1980). Therefore, some manner of state responsibility must be alleged. The “color of state law” requirement would be satisfied by alleging misuse of official power possessed by virtue of state law. For example, the Eleventh Amendment did not bar the representative of the estate of a state psychiatric hospital patient from seeking to impose individual and personal liability on the state hospital's superintendent (not the state), for an alleged deprivation of the patient’s rights. Even in this situation, it must be remembered that the state official is held liable, not the state itself. Attorney’s fees are recoverable, as are punitive damages against the individual.

As mentioned above, § 1983 actions are often brought against state or municipal employees who are acting under color of state law, including public health employees. An example is a city animal control worker who destroys a person’s rabid animal to protect the public health. Since the owner of the animal has a property interest, he may bring a § 1983 action against the employee for a violation of due process, which is a constitutional tort. However, this claim would fail if the city employee followed proper procedure, such as giving the owner of the animal notice and a hearing before the animal is destroyed. Therefore, it is important for a public health employee to abide by established procedure and law when carrying out his or her duties. Failure to do so may result in personal liability for damages. Had the animal control worker in this scenario failed to follow procedure and destroyed the animal without notice or a hearing, he may have been liable.

Limits of Claims Brought under § 1983

§ 1983 does not apply to federal officials. Nor does it allow suits against a state itself, which would violate the Eleventh Amendment. Instead, plaintiffs may seek relief against state officials and also against municipalities and other intra- state localities. Unfortunately, litigation often leads to unpredictable determinations about whether a certain official is a state employee or not. For example, the Supreme Court held in one case that a county sheriff was a state employee for purposes of a § 1983 action because he represented the state of Alabama, not the county in which he acted as law enforcement official, when executing his law enforcement duties in the course of a criminal investigation. McMillian v. Monroe County, 520 U.S. 781 (1997). This means that one must look to the functional nature of the official’s action or determination instead of the official’s title or the nature of the official’s employment. Whether an official is acting for the state or a local government is therefore a determination made on a case-by-case basis.

§ 1983 Liability for Defamation

Defamation is the act of harming the reputation of another by making a false statement to a third person. Although the distinction is generally not made in caselaw, defamation may divided into libel or slander. Libel means to defame someone in a permanent medium, usually in writing. Slander is defamation in a transitory form, normally speech. Although libel and slander are for the most part governed by the same principles, there are two important differences: (1) Libel is not only a tort, but may also be a criminal offense. Slander is strictly a civil injury. (2) Damages for slander--unlike those for libel-- are not presumed and thus must be proved by the plaintiff.

Defamation is almost impossible to challenge with a § 1983 action. The reason for this is that § 1983 actions are for violations of civil rights granted in the Constitution. Since defamation is a matter of state law, it is not a sufficient basis for bringing a § 1983 suit. In the rare case that a § 1983 action is held sufficient for defamation, it is because (1) the plaintiff suffered injury to his reputation from an official’s false statements, and (2) the plaintiff has also suffered burden or alteration of status or rights. The harmful effects of an injured reputation alone will not suffice as a “burden or alteration of status or rights.” A recent case exemplifies the concept of immunity for defamation, and the difficulty in maintaining a § 1983 suit. In Sadallah v. Utica, 383 F.3d 34 (2nd Cir. 2004), the court stated that defamation is an issue of state law, not of federal constitutional law, and therefore provides an insufficient basis to maintain a § 1983 action. The mayor made allegedly defamatory remarks about the physical condition of a restaurant, and the restaurant owner sued. Even assuming the mayor’s statements really were defamatory, the court would not allow for damages against the city and the mayor: “The state-imposed burden or alteration of status must be in addition to the stigmatizing statement. Thus, even where a plaintiff's allegations would be sufficient to demonstrate a government- imposed stigma, such defamation is not, absent more, a deprivation of a liberty or property interest protected by due process.”

Examples of burdens that satisfy the second requirement are the deprivation of the plaintiff’s property, and the termination of a plaintiff’s government employment.

Failure to Perform a Governmental Service

[DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989)](http://biotech.law.lsu.edu/cases/immunity/DeShaney_v_Winnebago.htm), discusses the state’s (or municipality's) liability toward individuals for failure to perform a service. In this case, the service was the protection of a boy whose father was known to authorities as abusive and violent. After many fruitless requests by the boy’s mother for help, the father beat the boy so severely that the child suffered permanent brain damage. The mother sued under 42 U.S.C. § 1983, alleging the state’s violation of the boy’s liberty interest in bodily integrity by its failure to intervene. The Court ruled that the state had no constitutional duty to intervene and protect the boy, despite knowledge of the situation. Thus, there could be no § 1983 liability.

DeShaney is significant because it holds that a state has no affirmative, constitutional duty to protect its citizens. There is no guaranteed minimal level of safety and security—Fourteenth Amendment Due Process protects life, liberty, and property from the state, not from third parties. Of course, the state could open itself to liability through tort law for such situations, but there is no § 1983 action available.

Importantly, the DeShaney analysis applies to police protection as well as child services. The rule is that, absent a special duty (no special duty existed in DeShaney) a municipality will not be liable for the inaction of police in preventing crime. A special duty to protect an individual may arise from a statute that identifies certain groups of individuals who are owed protection, or from the particular facts of the case. As DeShaney suggests, it is relatively uncommon that a court will find a special duty.

State actors can be liable when the government actually creates the danger which befalls an individual. As the Seventh Circuit has explained, "liability exists when the state affirmatively places a particular individual in a position of danger the individual would not have otherwise faced." Monfils v. Taylor, 165 F.3d 511 (7th Cir. 1998). An example of this cause of action would be when a police officer arrests an intoxicated person at night and drives him against his will to the town limits, and later the person is hit by a while walking home along an unlit highway. In that example, the danger to the individual of having to walk along the unlit highway did not exist until the officer placed the individual in that position, and can be said to be "state created."

A recent U.S. Supreme Court decision explores an issue left unanswered in Deshaney: Whether a city is liable in a § 1983 action for not enforcing a restraining order that, by its own terms, had to be enforced by any reasonable means. Town of Castle Rock v. Gonzalez, 125 S.Ct. 2796 (2005). Respondent had a restraining order issued against her estranged husband. The restraining order, as per Colorado statute, mandated that law enforcement:

"USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER" (caps in original)

When the respondent's three children were, with no prior notice, picked up by the husband in violation of the restraining order, she notified city police. The police initially told her to wait until 10 p.m. After 10 p.m., police told her to wait until midnight. At 3:20 a.m. the police still declined to get involved with the situation, but the husband appeared at the police station with a gun and opened fire. He was killed in the resulting fray, but the bodies of the children were found in his truck.

This situation differed from Deshaney in that respondent alleged a Fourteenth Amendment Due Process violation of property based on the town officials’ failure to enforce the explicitly worded restraining order (the individual officers had already been released from the case by reason of qualified immunity). Did Colorado grant the plaintiff a protected property interest in police enforcement of the restraining order? The Court held that the city was not liable under § 1983 because an "indirect and incidental result of the government's enforcement action does not amount to a deprivation of any interest in life, liberty, or property, for due process purposes." Id. at 11. The Court continued: "A state-law created benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its substantive manifestations." Id. at 12.

Castle Rock and DeShaney illustrate the reluctance of the judiciary to impose certain affirmative obligations upon local governments. The Court in Castle Rock alluded to a "well established tradition of police discretion that has long coexisted with apparently mandatory arrest statutes." Id. at 1. The Court narrowly interprets statutes that seemingly limit or remove police discretion, preferring to err on the side of maintaining the discretion at the expense of the plaintiff's claim. The Court went on to observe that even if the statute had conferred an entitlement upon respondent, this entitlement would not necessarily have constituted a property right for constitutional due process purposes because there was no way to assign a monetary value to it and an entitlement of this sort was not is not traditionally considered property. Id.

Liability for Violating the State Constitutions

The U.S. Constitution acts as a minimum guarantee of certain rights upon which no law can impinge, but states are free to extend those rights further than the federal Constitution demands. When a state extends greater protections in the state constitution than the federal Constitution requires, what remedy is available for a violation of that state constitution (but not the federal Constitution)? Courts have the power to strike laws that violate a state's constitution, and if the law violates the federal Constitution it can be challenged through a 42 U.S.C. § 1983 action, but if the state constitution grants greater protections than the federal Constitution, is there a federal remedy available?

Seemingly, if there is no federal violation, there can be no federal remedy, and the courts can impose only state relief, possibly under the state tort claims act, and strike the law as a violation of the state constitution. To illustrate, the state of Washington enacted a statute authorizing a program of collecting DNA samples from convicted felons. While this law does not violate the U.S. Constitution's Fourth Amendment guarantee against unlawful searches (State v. Surge, 122 Wash. App. 448, 94 P.3d 345 (2004)), the state's constitution provides for greater protection than the federal. State v. Jones, 45 P.3d 1062 (Wash. 2002). In this example, Washington courts have not yet ruled on the validity of the law under the state constitution. However, the mechanism for challenging the validity of such a statute is a challenge under the state constitution and, depending upon state law, a tort claim. If there is no violation of federal law or constitutional provision, there is no federal remedy.

Liability for Violating State Statutes and Regulations

In the context of public health and safety, one can see how a situation such as this could come into play with state statutes such as emergency quarantine orders. If, for example, quarantine is administered by the state under state law, tort liability questions are answered through the specific quarantine exception of the state tort claims act. Other types of emergency procedures would normally be protected from tort liability by the broad discretionary function exceptions. But the discretionary exception to liability can be taken away by a narrow statute which leaves no room for choice or policy decision. This often occurs in the area of health inspections. *See* [Gregor v. Argenot Great Central Ins. Co., 851 So. 2d 959 (La. 2003)](http://biotech.law.lsu.edu/cases/food/gregor.htm) (Department of Health held partly liable for wrongful death of restaurant patron who died as a result of eating raw oysters in a restaurant that failed to post mandatory warnings about the dangers of consuming raw shellfish).

The state law may also be reviewed if it violates provisions of the federal Constitution. For an emergency quarantine order, this likely would involve habeas corpus or Fourteenth Amendment Due Process of liberty. In the case of an emergency act or statute, courts are extremely unlikely to grant writs of habeas corpus or strike laws which could undermine public health. *See* [Jacobsen v. Mass., 197 U.S. 11 (1905)](http://biotech.law.lsu.edu/cases/vaccines/Jacobson_v_Massachusetts_brief.htm) (forced vaccination laws are not an unconstitutional invasion of liberty because the policy interest of the public's health outweighs the liberty interest of an individual). This is especially true when the law contains standards for operation. South Carolina's emergency health powers act contains procedures and standards for officials when an emergency quarantine is declared, such as living conditions for the quarantined and requirement for expedited judicial review. Such provisions enable the laws to pass constitutional muster.

Liability of State Contractors

The Constitution guards against violations of rights by government officials, not violations by private parties. Thus, to be liable in a § 1983 claim, the defendant must either be a state (or local) government worker or a private worker acting under color of state law. This may be a difficult determination when the government outsources public work to private parties. The Supreme Court has issued some guidance in this area, holding that a "private action will be considered to be 'state action' for purposes of [the] Fourteenth Amendment if, though only if, there is such close nexus between state and challenged action that seemingly private behavior may be fairly treated as that of state itself." Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001). Such a showing is sufficient to demonstrate that the defendant individual was acting under color of state law. *Id.* Unfortunately, this standard still leaves room for unpredictability because, as the Court declares, no single factor is a necessary condition that applies across the board for finding state action, nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to government. *Id.* at 930.

Private workers acting under color of state law can not raise the defense of qualified immunity. Richardson v. McKnight, 521 U.S. 399 (1997). In that case, the Court found no historical or policy reasons for granting qualified immunity to private individuals working for a private corporation that operated a state prison. This rule has since been applied to a physician performing contract work for a state health facility. Jensen v. Lane County, 222 F.3d 570 (9th Cir. 2000).

In a § 1983 action, the Supreme Court ruled that a doctor who was under contract with the state to provide medical services to a state prison hospital on a part-time basis was acting under color of state law. West v. Atkins, 487 U.S. 42 (1988). However, many other courts have held that those who contract with the state to perform public functions do not necessarily become state actors for § 1983 purposes. The Third Circuit has said that acts of private contractors do not become acts of the state under § 1983 simply because public contracts are being performed. Boyle v. Governor’s Outreach and Assistance Ctr., 925 F.2d 71 (3d Cir. 1991). The Sixth Circuit ruled that a private mental health facility under contract with the state is not a state actor when it comes to personnel decisions because such decisions are not directly related to any legal obligation of the state. Simescu v. Emmett County Dept. of Soc. Serv., 942 F.2d 372 (6th Cir. 1991).

An example of a private contractor who received state immunity in a § 1983 action is in the case Ostrzenski v. Seigel, 177 F.3d 245 (4th Cir. 1999). Dr. Ostrzenski brought a § 1983 action against Dr. Seigel, who conducted a peer review of Dr. Ostrzenski at the behest of the Maryland Board of Physician Quality Assurance. Dr. Ostrzenski alleged that Dr. Seigel denied him due process under the Fifth and Fourteenth Amendments as a result of procedural irregularities in the peer review process. The court dismissed the claim, reasoning that Dr. Seigel was entitled to absolute quasi- judicial immunity from prosecution on Dr. Ostrzenski's § 1983 claim. In the court’s view, Dr. Seigel was performing a function analogous to a prosecutor reviewing evidence to determine if charges should be brought, and absolute immunity was necessary to foster an atmosphere in which a reviewing physician could exercise professional judgment without fear of retaliation.

# Liability of a Federal Officer under State Law

An interesting issue is whether a state may prosecute a federal official for a breach of state criminal law while acting within the scope of federal duties. The answer is no, because the federal official has immunity from the state criminal law, derived from carrying out federal law or duties and thus protected by the Supremacy Clause- the supremacy of federal law over state law. The threshold issue is that the federal official must have been working in the scope of his duties at the time. This issue was first faced by the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890). In this unique case, a federal marshal killed a California man in defense of Justice Field, who was a member of the U.S. Supreme Court. The man had previously made violent threats against Justice Field, and Neagle was assigned to protecting him. In a belligerent encounter, the man slapped Justice Field to provoke a fight, and allegedly reached into his breast pocket. Neagle, fearful the man was going to pull out a weapon, fatally shot him. The man turned out to be unarmed, and a California sheriff arrested Neagle on murder charges.

On writ of habeas corpus, the U.S. Supreme Court released Neagle and made clear that state law is displaced if it imposes burdens on a federal officer's attempts to protect federal interests or execute federal law, even if no federal statute specifically authorizes the federal official's conduct, as was the case here. *Neagle* established a two-prong test for this type of immunity from state criminal law: (1) Was the officer performing an act that federal law authorized him to perform? (2) Were his actions necessary and proper to fulfilling his federal duties? If the federal officer satisfies this test, he or she is immune from prosecution for violation of state law.

A similar issue was brought forth more recently in the Ruby Ridge case, Idaho v. Horiuchi, 215 F.3d 986 (9th Cir. 2000). Horiuchi was an FBI officer who fatally shot an unarmed woman during an FBI raid on a ranch in Idaho. He had intended to shoot the armed man near to her. The state of Idaho subsequently brought criminal charges against the federal officer for involuntary manslaughter of the woman. The court, relying on *Neagle*, dismissed the charges. The officer was immune from the state charges through the Supremacy Clause because he satisfied the two prong test. Horiuchi was acting within the scope of his duties at the time, and he "reasonably thought" his actions were necessary and proper.

If the officer fails this test, he is subject to the state criminal prosecution. In either case, a *Bivens* civil action may be brought by the individual against the federal officer for the alleged misbehavior. Also, the U.S. Department of Justice could choose to prosecute the federal officer, even where the state can not.